Supreme Court of the United States.

No. 1.—October Term, 1905.

José Antonio Fernandez y Perez, Plaintiff in Error, vs. José Perez y Fernandez.	In error to the District Court of the United States for the District of Porto Rico.

[April 23, 1906.]

An action at law was begun November 18, 1901, in the United States District Court for the District of Porto Rico by the defendant in error, José Perez y Fernandez, against José Antonio Fernandez y Perez, to recover in an action for "trespass upon the case for wrongful attachment." The declaration contained the usual averments of a declaration in a common law action and averred that the attachment had been issued maliciously and without probable cause, and levied upon a certain two-story house then belonging to the defendant in error, in Mayaguez, Porto Rico. One Rafael Diaz Aguerria was made co-defendant, and it was averred that the attachment was issued in a suit brought by Fernandez as attorney in fact and agent of Aguerria, who authorized and ratified the acts complained of. It appeared that the defendant in error Perez had owed about 6,000 pesos to one Claudio Barro, who died, leaving a will in which Rafael Diaz Aguerria was named as executor. The will was probated in Spain, and Aguerria qualified there as executor of the estate. Perez, on November 10, 1899, recorded a mortgage in favor of one Don Victor Ochoa y Perez for 20,000 pesos. The suit in which the attachment was issued was begun January 2, 1900, by the filing of a declaration to recover on certain notes, and was brought in the name of Aguerria as executor of the last will and testament of Claudio Barro. The action was begun in the military court established by the authority of the United States after the cession of Porto Rico, called the United States Provisional Court for the Department of Porto Rico, which court was succeeded by the United States District Court. On the date of the beginning of the suit an affidavit for attachment was filed, which was sworn to by Fernandez, plaintiff in error, purporting to have the power of attorney of Rafael Diaz Aguerria, executor of the last will and testament of Claudio Barro, the ground alleged being that the affiant had reason to believe that the defendant intended to and would fraudulently part with or conceal his property before judgment could be recovered against him, so that the judgment could not be satisfied out of the property. The summons was issued, and a writ of attachment was levied upon the premises of the defend-

ant in error, and notice posted thereon. Further proceedings were arrested by an injunction proceeding in the United States court, brought by Jacinto Perez Barro, heir of Claudio Barro, deceased, upon the ground that Aguerria, plaintiff in the attachment proceeding, suing as executor of the will probated in Spain, had not taken out ancillary letters in Porto Rico. The action for malicious attachment was joint in form and the summons was returned as to Aguerria that the marshal was unable to find him within his district. The declaration averred that he was a resident of Porto Rico, but he was never served with summons in this case. Fernandez demurred to the declaration, averring that it appeared on its face that he was acting as the duly authorized agent of Aguerria, and was neither principal nor party plaintiff to the action against Perez, the defendant in error. This demurrer was overruled, and no exception taken to such action by Fernandez. Afterwards the general issue was filed, the case was tried to a jury without objection and upon a charge of the court, substantially leaving to the jury the question whether Fernandez had caused the attachment to issue and be levied maliciously and without probable cause, to the injury of the standing and credit of the defendant in error as a merchant. A verdict was returned in favor of the defendant in error for the sum of $7,000, upon which a motion for a new trial was overruled and judgment entered.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

This case was argued orally and upon briefs at the October term, 1904, of this court. After the case had been argued and submitted, on December 5, 1904, an order was entered as follows:

"No. 6. *José Antonio Fernandez y Perez, Plaintiff in Error*, v. *José Perez y Fernandez.* Counsel are requested to submit additional briefs on these points:

"1. Can this court, on the record of this case, properly consider and determine the contention of the plaintiff in error that a civil action like the present one was, at the date of the attachment and the commencement of this action, unknown to and unauthorized by the laws and jurisprudence of Porto Rico?

"2. Was a civil action like the present one known to the laws and jurisprudence of Porto Rico at the time the attachment in question was sued out?

"3. Under the law of civil procedure as existing in Porto Rico at the time of the attachment proceeding complained of, could the damages herein claimed have been allowed or assessed in that proceeding upon the dissolution of discharge of the attachment? If so, was that mode exclusive of every other for ascertaining such damages?"

Our views in this case will be practically in answer to these questions.

The case affords a striking illustration of the difficulty of undertaking to establish a common law court and system of jurisprudence in a country

hitherto governed by codes having their origin in the civil law, where the bar and the people know little of any other system of jurisprudence. The action in this case was begun and tried upon pleadings and under principles which are controlling in a state following the common law, having its origin in England, and the case was submitted to the jury upon general principles governing such actions for the recovery of damages for the seizure of property upon writs of attachment issued maliciously and without probable cause. The action proceeded in all respects in form and substance as it would had it been begun and prosecuted in a common law state.

Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. (*Kepner* v. *United States*, 195 U. S. 100, 122.) This policy has been followed in dealing with the Porto Ricans. (President's Message, Dec. 5, 1899; Walton's Civil Law in Spain and Spanish America, 594.) The new civil government was established by the act of April 12, 1900, commonly known as the Foraker act. (31 Stat. 77.) Section 8 of that act provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The first inquiry then to which we shall direct attention concerns the law in force at the time of the passage of this act in Porto Rico, governing the issuing of attachments and the recovery of damages for wrongfully causing the same to issue and be levied. The additional briefs filed by counsel upon both sides in this case since the order of the court of December 5, 1904, above quoted, exhibit commendable zeal and industry in investigating this question and bringing to the attention of the court the Spanish treatises and cases throwing light upon the subject. Upon behalf of the defendant in error it is insisted that the action is governed by Article 1902 of the Civil Code of Porto Rico, which provides: "Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done." (War Department Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines, 244.) Much discussion is had in the briefs as

to the meaning of this section, and whether the term "fault"—"culpa" in the Spanish jurisprudence—is broad enough to include actions brought to recover for conduct which is alleged as malicious, as distinguished from those where the basis of the recovery is a careless act or omission which does not have for its motive the intention to cause damage.

In the view we take of this case we do not find it necessary to consider the authorities cited, or the views pressed pro and con as to whether a malicious act, such as is complained of in this case, is within the terms of this article of the code. The references to sections of the Code of Procedure show a comprehensive system specially provided for the issuing of attachments and the recovery of damages where the same were wrongfully procured to be allowed. The subject of attachment of property is treated in Title XIV, Law of Civil Procedure, War Department translation, Article 1395 *et seq.* Unlike ordinary American procedure, an attachment is issued by order of the judge and certain grounds are recognized. They are summarized as follows: "If the debtor be a foreigner; or if, being a citizen he has no known domicil, or does not own real estate, or does not have any place of business at which the payment of the debt may be demanded, It may also be ordered, without any such attendant condition, if he has disappeared from his home or place of business, leaving no one in charge, or if he conceals himself, or if there be reasonable grounds for believing that he will conceal or undersell his property to the prejudice of creditors." (Art. 1398.) If it shall turn out that the attachment was wrongfully procured, ample provisions are made for the adjudication and recovery of damages in the action. See Articles 1409–1415, which are set forth in the margin.*

The theory of these sections of the code is that when the court which issues the attachment is satisfied that the same has been wrongfully issued, it will proceed in the manner pointed out in the statute to ascertain the loss and damages which the defendant has suffered, and in the same action to tax the costs against the plaintiff and to adjudge him to indem-

*ART. 1409. A person who has requested and obtained a provisional seizure for an amount of more than 1,000 pesetas must request the ratification thereof in an executory action or in the declaratory action which may be proper, filing the corresponding complaint within twenty days after the levying of the attachment. Upon the expiration of this period without the action having been instituted or a ratification of the seizure having been requested, the latter shall be null *de jure*, and shall be without effect at the instance of the defendant without the plaintiff being heard. A petition for a rehearing may be made against this ruling, and if it should not be granted, an appeal for a stay and review of the proceedings may be interposed.

ART. 1410. Notwithstanding the provisions of the foregoing article, if the debtor should be included in any of the cases of Article 1398, the provisional seizure may

nify the defendant for such losses and damages. And these losses and this recovery are adjudicated in the manner pointed out in Articles 927 *et seq.* of the Code of Civil Procedure. These articles are found in Title VIII of that code, ntitled "Execution of Judgments." The defendant in the attachment having been declared entitled to recover damages, proceedings follow for the purpose of ascertaining the amount thereof. Section 927 *et seq.* provide for the manner of making up an issue, taking testimony and hearing witnesses, and, upon final order or decree made by the court, an appeal can be prosecuted. This full and comprehensive

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also be ordered after the institution of the action, a separate record being made thereof. The provisions contained in Articles 1399 to 1410, inclusive, shall be applicable to this case, and after the attachment has been levied the proceedings thereupon shall be continued as prescribed for incidental issues. When an attachment is vacated by a final ruling, because it is not included in any of the cases of said Article 1398, the plaintiff shall be taxed all the costs and be adjudged to indemnify the defendant for any losses or damages he may have suffered, which shall be recovered in the manner prescribed in Article 1415.

ART. 1411. When the provisional seizure becomes of no effect by reason of its having become null *de jure*, in accordance with Article 1409, the surety shall be ordered cancelled in the same ruling, if any should have been furnished, or what may be proper shall be ordered for vacating the attachment and cancelling the cautionary notice, in a proper case, and all costs shall be taxed against the plaintiff, who shall also be adjudged to indemnify the defendants for any losses and damages he may have incurred. If the attachment should be vacated for any other reason, the ruling thereupon shall also determine what may be proper according to the cases with regard to costs and the indemnification of losses and damages which may have been suffered.

ART. 1412. If the acknowledgment of a signature or of the written evidence of a debt should not be made or be delayed through the fault of the debtor, and if the filing of the complaint and the ratification of the attachment should depend thereupon, the time lost in obtaining said acknowledgment shall not be included in the period of time prescribed in Article 1409.

ART. 1413. If the owner of the property seized should request it, the attachment creditor must file his complaint within the period of ten days, unless any of the circumstances mentioned in the foregoing article is attendant. Should he not do so, the attachment shall be vacated, and the costs, losses and damages shall be taxed against him.

ART. 1414. After the provisional seizure has been levied the debtor may object thereto and request that it be vacated, with indemnification of losses and damages, if not included in any of the cases of Article 1398. He may make this petition within the five days following that of the notice of the ruling ratifying the seizure, or before that time, if he should deem it proper, and it shall be heard and determined in a separate record in accordance with the procedure prescribed for incidental issues.

ART. 1415. In cases in which there is an adjudication of losses and damages, as soon as the ruling thereupon becomes final, they shall be recovered according to the procedure established in Articles 927 *et seq.*

statutory method of ascertaining and adjudging the damages to be recovered in cases where attachments are wrongfully issued and vacated for any cause, would seem to preclude the application of general provisions of the code giving a right of recovery for acts of fault or negligence.

We are not cited to any decision of the Supreme Court of Spain expressly adjudicating this matter, but are referred by counsel on both sides to a treatise on the law of civil procedure, ("Commentario a la Ley de Enjuiciamiento Civil," Edition of 1891, p. 412,) by Senor José Maria Manresa y Navarro, said to be a text-writer of the highest authority in Spain. The English translation of his text is given as follows: "We do not think that this rule [relating to independent actions for damages under the mortgage law] is applicable to attachments, because on the motion to vacate an attachment no discussion or proof of the existence of losses and damages is allowed, and because the law itself provides, in addition to this, that, when by final order of the court, an attachment is vacated, the plaintiff be adjudged to pay the defendant his losses and damages, they being ascertained in the manner provided in Article 1417,* that is, according to the procedure in Article 928 *et seq.* Such a proceeding permits of a discussion, if the issue is made, not only of the amount but of the existence of losses and damages. It follows that the court can decide on both questions without the necessity of a new suit, which is precisely what the law has sought to avoid." This seems to be a direct authority for the proposition that this plan of recovery of damages for wrongful attachments is exclusive. In the absence of authority to the contrary, and in view of the plain provisions of the code, we accept it as properly declaring the existing law upon the subject. We reach the conclusion that the Porto Rican system in force at the time of the passage of the Foraker act, and binding until changed or amended, provided in the state of affairs shown by this record, a recovery for damages in the method pointed out in the attachment suit, by the special statutory method provided for, and not otherwise.

The difference between the liability of one wrongfully levying an attachment at common law and the assessments of costs and damages under these provisions of the Porto Rican code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the code remedies given in Porto Rico the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases, where the attachment is vacated, irrespective of the motive in suing it out.

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*Art. 1415, Porto Rican Code.

This brings us to briefly inquire as to the nature and extent of the jurisdiction and practice of the United States courts in Porto Rico. Section 34 of the Foraker act established a United States District Court for Porto Rico and gave to it, in addition to the ordinary jurisdiction of a District Court of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and provides that it shall proceed therein in the same manner as a Circuit Court, the intention of Congress obviously being to establish a United States court in Porto Rico, having like jurisdiction of both District and Circuit Courts of the United States in the States. Section 914 of the Revised Statutes of the United States provides: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." The act of August 30, 1888, (25 Stat. 433,) provides that the Circuit Courts of the United States shall have original jurisdiction concurrent with the courts of the several States in suits at common law and in equity. We think it was the intention of Congress in the Porto Rican act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the States, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

In the Revised Statutes of the United States, section 915, it is provided as to attachments: "In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held, for the courts thereof; and such Circuit or District Courts may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: *Provided*, That similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy." By analogy it would seem that the District Court of Porto Rico, exercising the jurisdiction of a Circuit Court in its practice as to the issuing of attachments, is to adapt itself to the local practice

recognized and established in Porto Rico. Circuit Courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the State in which the courts are held. (*Bates et al.* v. *Days*, 17 Fed. Rep. 167.)

It is further objected on the part of the defendant in error that Porto Rican procedure can have no application to this action against Fernandez, because he was not a party plaintiff to the attachment suit, and the statute provides that the costs of the attachment and damages shall be assessed against the plaintiff in the action. We do not perceive that this fact affects the determination of the question as to the proper remedy in such cases. There is nothing in this action to show that Fernandez was not authorized to bring the suit and take out the attachment in behalf of the plaintiff in that suit, in which event Aguerria would be liable for the acts of his agent in that behalf. Nor is there any reason why Fernandez might not be made a party to the attachment proceeding if damages were to be assessed against him alone.

It is further objected that the United States court has no method by which it can assess these damages in the manner required in the Porto Rican code. In giving the remedies provided therein and assessing the damages we see no reason why that court cannot adapt itself to the requirements of the local code and administer the remedies therein provided. In *Traction Company* v. *Mining Company*, (196 U. S. 239,) it was held that the Federal court might follow the methods required by the Kentucky statute in administering the local law for the condemnation of property, so far as required to meet the needs of justice. In that case the local law required the appointment of appraisers by the court to assess compensation for the property taken. Speaking of the judicial power of a Circuit Court of the United States administered in such courts it was held: "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States." In view of the provisions of the Foraker act, continuing local laws in force, this reasoning has application to the powers of the United States court in that territory. There can be no difficulty in exercising the attachment remedies provided in the Porto Rican code, if the attachment shall turn out to have been wrongfully issued, and making an assessment of damages in the manner provided in that code. The procedure is simple and easily administered. Nor is there anything in that special procedure

encroaching upon the right to a jury trial, secured by the Federal Constitution, in suits at common law where the value in controversy exceeds twenty dollars. If it be assumed—a point which is not necessary to decide—that that part of the Constitution is applicable and in force in Porto Rico, the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized.

Nor would the general provisions of the Revised Statutes, (sec. 648,) providing for a jury trial as to issues of fact in Circuit Courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican code as to assessment for damages for wrongful attachment.

Section 8 of the Foraker act, as we have seen, continues in force the laws and ordinances of Porto Rico, except as modified by military orders and decrees in force, so far as the same are not inconsistent or in conflict with the statutory laws of the United States, which by sec. 14 of the act, when not locally inapplicable, with certain exceptions, are declared to be in force and effect in Porto Rico as in the United States. The general provisions as to jury trials in civil causes in Circuit Courts of the United States are not inconsistent with the enforcement of a special statutory proceeding as to the assessment of damages in attachment proceedings, as to which the United States has no special statutory procedure, and enforces in that respect the requirements of the local law.

If we are right in holding that the Porto Rican law and practice as to attachments and the recovery of damages in respect thereto are controlling in a Federal court in that territory, and a common law action for a wrongful and malicious attachment was unknown to the Porto Rican procedure, the court had no jurisdiction of the action. The record shows that practically no exception was taken in the record and proceedings in the trial court, but it is familiar law that this court will of its own motion inquire into the jurisdiction which it has and as well that of the court below, without any special exception being taken. If, as illustrated in the brief for counsel for the plaintiff in error, a Circuit Court of the United States should undertake to entertain a bankruptcy proceeding or an admiralty cause, its proceedings would be void for want of jurisdiction. So, in the present case, there being no such common law action enforcible under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Where the jurisdiction fails the objection can be raised in this court; if not by the parties, then by the court itself. (*Parker* v. *Ormsby*, 141 U. S. 81; *Mansfield Railway Co. etc.* v. *Swan*, 111 U. S. 379; *Thompson* v. *Railway Co.*, 6 Wall. 134.)

We, therefore, reach the conclusion that the United States District Court had no jurisdiction of this action, and consequently the proceedings had therein were null and void.

Judgment reversed.

Mr. Justice WHITE dissenting:

As it is conceded that the question upon which the judgment is now reversed was not saved in the court below, I am constrained to dissent. In my opinion the error, if any, was a mere question of mode of procedure, involving no want of jurisdiction *ratione materiæ*, even conceding that the presence of a question of such a character would authorize this court to reverse—in the absence of any exception in the court below—or any reference to the question in that court.

Mr. Justice MCKENNA concurs in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.